IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2241 OF 2018

Shri Girish Kumaran Nayar,
Age: 31 years, Occ: Business,
R/t:Room No.A-404, K.M.C. Park,
Behind Ganesh Mandir,
Veer Savarkar Road,
Virar (E),
Tal: Vasai, Dist: Palghar
(At present Mumbai Central
Prison, Mumbai) ... Applicant

Vs

The State of Maharashtra ... Respondent

...

Mr. Abhaykumar Apte for the Applicant.

Mr. Yogesh Dabke, APP for the Respondent-State.

API Mr. Dalvi and API Mr. P.N.Kokare attached to Virar Police Station present.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : 3RD FEBRUARY, 2021.
PRONOUNCED ON: 17TH FEBRUARY, 2021.

JUDGMENT:

Applicant is one of the four accused in Crime No.574 of 2016 in respect of offences punishable under

Sections 115 read with Sections 302, 120B of the Indian Penal Code, 1860, Sections 4 and 25 of the Arms Act and Section 37(1) of the Bombay Police Act, apart from offences under Sections 3(1)(ii), 3(2) and 3(4) of the Maharashtra Control of Organised Crime Act, 1999 (‘**MCOC**’ for short). By this application, the applicant seeks bail.

2 Heard Mr. Abhaykumar Apte, learned counsel for the applicant and Mr. Dabke, learned Additional Public Prosecutor for the State. With the assistance of the learned counsel, I have gone through the bail application, annexures thereto and the relevant parts of the charge-sheet. I have also been taken through the affidavit filed by Mr. Jayant Bajbale, Sub Divisional Police Officer, Virar Division, District: Palghar for opposing the grant of bail. Prosecution case has been described in the proforma of the charge-sheet.

3 Briefly stated, prosecution’s case is that on 16th

October, 2016, constable Mohite attached to Virar Police Station received information from one of the informants that four unknown persons had assembled/gathered at and near Ganpati Mandir in Innova Car No.MH-04 EH 7725, with dangerous weapons and they were planning to eliminate a person named ‘Gabari’, a nick name of, Arun Hira Patil, a relative of the local corporator. On this tip-off, Mohite, proceeded to Ganpati Mandir with two constables. In order to conceal their identity, they remained passive in plain clothes and heard the conversation amongst them. Constable, Shankar Shinde, who accompanied Mohite, knew, Girish Nair, one of the four accused and eventually Girish Nair applicant before this Court. Constable Mohite, heard that four persons were outlined the plan as to how Gabari was to be killed. But as it appears one of those accused persons noted that someone was keeping watch on them, all four accused persons fled the spot, leaving behind the car as it is. Though team of constables chased but they could not nab them. Whereafter the team of constables made efforts to open up door of the car but found, it was locked. Constables peeped into the car from the glass window and had noticed dangerous weapons were kept below the seat. Information was passed over to Senior Inspector, Virar Police Station. Eventually, someone informed that car was belonged to Mr. Kini. Surprisingly, Police Constable Shinde, had cell number of Mr. Kini. Thus, Kini was called, he came on the spot with one Kisan Tare to whom Mr. Kini had sold the car. When enquired with Kisan Tare about the car, he informed that since before fifteen days, car was given on rent to Mr. Bhavesh Babubhai Kalaria, but Kisan Tare was having spare key of the Innova Car. Thus, team of constables opened up the car wherein they found the dangerous weapons like, swords, knives, blade of which was approximately 10 inches long, iron rods, chilli powder, mobile hand-set. As such, Innova car and the weapons were seized in presence of the two panchas.

4 It is prosecution case that with objective of

gaining pecuniary benefits by use of violence or intimidation or coercion or other unlawful means, applicant and his gang conspired to eliminate Gabri. Kishor Mohite constable thus, filed complaint which came to be registered as Crime No.574 of 2016under Section 115 read with Section 302, 120 and 120B of the IPC.

5 Applicant is one of the accused in the said crime. He was apprehended on 7th December, 2016 and after remanding him to police custody till 12th December, 2016, he was remanded to judicial custody. On 6th January, 2017, the approval under Section 23(1)(a) of the MCOC Act was granted whereupon the offences came to be registered under Sections 3(1)(ii), 3(2) and 3(4) of the MCOC Act.

6 Mr. Apte, the learned counsel for the applicant contended that false case has been fastened against the

applicant and it is submitted that the prosecution has come out with concocted story, which is full of false events and eventualities. Mr. Apte contended that no case of offence punishable under the MCOC Act has been made out and there is absolutely no material in the charge-sheet to make out prima-facie case of any offence against the applicant. Mr. Apte submitted penal provisions of Section 115 of IPC have been incorrectly invoked and applied. It is contended that prosecution case is inherently improbable and alleged recovery of car and weapons has been planted just to apply stringent provisions of the MCOC Act.

7 Mr. Apte has also criticised prior approval to contend that it has been granted without application of mind. It is contended that prior approval does not show which two charge-sheets were considered by the authority to hold that the applicant in the subject case was member of organised crime syndicate and indulged in continuous unlawful activities of the organised crime syndicate. He

submits, affidavit filed by the prosecution does not spell out which more than one charge-sheet have been filed in respect of cognizable offence untaken by the applicant as a member of crime syndicate within the preceding ten years for applying MCOCA. It is further contended that crime chart as against the applicant do not show that offences committed were on behalf of the organised crime syndicate or as its members individually and/or collectively. On these grounds. Mr. Apte seeks enlargement of the applicant on bail.

8 Mr. Dabke, the learned Additional Public Prosecutor, on the other hand supported the prosecution case and brought to my notice crime chart of the applicant and the co-accused to contend that the penal provisions of the MCOC Act have been rightly applied and further track record of the applicant suggests, if he is released on bail, there is every likelihood of applicant indulging into similar activities.

9 I have perused the charge-sheet filed in the Crime No.574 of 2016. It may be stated that except placing the criminal antecedents/crimes at the discredit of the applicant, no other material has been placed before me to ascertain which past charge-sheets were considered by the authority before granting the prior approval under Section 23(1)(a) of the MCOC Act. Neither the approval dated 6th January, 2017 makes any reference to past charge-sheets nor any particulars thereto, were stated in the affidavit of the Investigating Officer. In **Prafulla s/o. Uddhav Shende v. State of Maharashtra**[1], this Court has observed in paragraphs 29, 43 and 44 that

> *29. Since the definitions, though intertwined in a cyclic order, are clear and unambiguous, it would follow that each ingredient in the definitions, or the alternative thereof provided by the definitions themselves, would have to be proved. Viewed thus, for charging a person of organised crime or being a member of organised crime syndicate, it would be necessary to prove that the persons concerned have indulged in:*

1 (2009) ALL MR (Cri) 870

(i) an activity,
(ii) which is prohibited by law,
(iii) which is a cognizable offence punishable with imprisonment for three years or more,
(iv) undertaken either singly or jointly,
(v) as a member of organised crime syndicate i.e. acting as a syndicate or a gang, or on behalf of such syndicate.
(vi) (a) in respect of similar activities (in the past) more than one charge sheets have been filed in competent court within the preceding period of ten years,
(b) and the court has taken cognizance of such offence.
(vii) the activity is undertaken by :
(a) violence, or
(b) threat of violence, or intimidation or
(c) coercion or
(d) other unlawful means.

(viii)(a) with the object of gaining pecuniary benefits or gaining undue or other advantage or himself or any other person, or

(b) with the object of promoting insurgency.

43.This fortifies the conclusion that mere proof of filing charge sheets in the past is not enough. It is only one of the requisites for constituting offence of organised crime. If only the past charge sheets were to be enough to constitute offence of organised crime, it could have offended the requirement of Article 20(1) of the Constitution and possibly Article 20(2) as

> *well, (and in any case Section 300 Cr.P.C.). Had these judgments of the Supreme Court and Division Benches of this Court been cited before the learned Single Judge deciding Amarsingh Vs. State 2006 ALL MR (Cri.) 407) the learned Single Judge, without doubt, would not have held that the matter was simply one of an arithmetical equation. The said judgment cannot be reconciled with the judgments of division benches in Jaisingh Vs. State 2003 ALL MR (CRI) 1506 and Bharat Shah Vs. State, 2003 ALL MR (Cri) 1061, which I am bound to follow.*
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> *44………… Therefore, since the previous criminal history of the applicants denotes that they had been or are being separately charged/ tried for those offence before competent courts, there is no question of such offences constituting offence of organised crime." (emphasis supplied)"*

10 Perusal of the allegations in the subject crime do not point out though this crime (Crime No.574 of 2016) committed by the applicant in capacity as members of organised crime syndicate either as its leader or on behalf of such crime syndicate.

11 Be that as it may, indisputably fourteen crimes/offences have been registered against the applicant for different offences punishable under Indian Penal Code, 1860. However, out of these offences, in respect of five offences, investigation is in progress; whereas in seven offences/crimes, charge-sheets have been filed and in one crime, applicant was convicted under Section 302 of the Indian Penal Code, 1860 but acquitted in appeal by this Court. However, in absence of better particulars of these fourteen offences, like, which charge-sheets, were considered before invoking provisions of MCOCA, I have perused the present charge-sheet wherein gist of offences is summarised.

12 Be that as it may, in the back-drop, I assume, there are fourteen previous offences registered against the applicant. Now let me see whether, previous offences registered against the applicant, were committed by him singly or jointly as a member of crime syndicate or on

behalf of crime syndicate, so as to constitute, “continuing unlawful activity”; AND whether prosecution has shown, prima-facie, some nexus between the past crimes at his discredit and present crime.

. Crime chart shows, Crime No.282 of 2016 was registered under Sections 454, 457, 380 read with Section 34 of the IPC against the applicant and Vishal Chavan and Tejas @ Tippan Sonawane, who are co-accused in C.R.No.574 of 2016. However, it is to be noted that in this crime (I.e.CR 282 of 2016), charge-sheet has not been filed and investigation is in progress as is evident from Page 104 of the paper-book. Therefore, it is to be stated, that in respect of this crime, charge-sheet has not been filed and cognizance has not been taken. As such, for want of clarification from the prosecution I keep the Crime No.282 of 2006 out of consideration for ascertaining whether this offence was committed in continuation of unlawful activity within the meaning of Section 2(c) of the MCOCA. So far as other offences registered against the applicant are concerned, prima-facie, prosecution could not establish nexus between such offence at his discredit and the present crime. In-as-much as, present crime on the face of it has been allegedly arose out of vengeance i.e. in retaliation and personal enmity; whereas all past offences were in the nature of theft and/or house breaking committed individually or with others. Evidence does not suggest that the past offences were committed by the applicant along with present co-accused except Crime No.282 of 2016, in respect of which investigation is in progress. Thus, offence committed in the past has prima-facie no nexus to present offence, wherein the MCOCA has been invoked. In the case of **State of Maharashtra v. Bharat Shantilal Shah and Others** [2], the Hon’ble Apex Court has held that offences, which do not look to be common to those under the MCOC Act, would not be relevant for the purpose of denying the relief of bail. Moreover, reply filed by the prosecution does not show that previously registered offences have anything

2 (2008) 13 SCC 5

in common with the offences registered in the present crime.

13 It may be stated, that mere number of filing charge-sheet in the past is not in enough. It is only one of the requisites for constituting organised crime. It has been observed in **Prafulla (Supra)** that if only the past charge-sheets were to be enough to constitute offence of organised crime, it could have offended the requirement of Article 20(1) of the Constitution and possibly Article 20(2) as well. Here the prosecution has just relied on the previous offences at the discredit of the applicant and nothing more. To constitute continuing unlawful activity following are requirements of law:

> *"i more than one charge-sheet, alleging commission of cognizable offence punishable with imprisonment of three years or more;*
>
> *ii a charge-sheet should consist of averments, alleging unlawful activity undertaken either singly or jointly by the*

accused;

iii) as a member of organized crime syndicate or on behalf of such syndicate;

iv) the cognizance of such offence is taken by the competent court."

Thus, in order to bring an alleged act within the ambit of MCOC Act, the above mentioned requirements are mandatory. Therefore, word "in respect of which" in definition of clause of "continuing unlawful activity" indicates that it is not a normal charge-sheet, alleging commission of cognizable offence but requirement is that alleged acts is undertaken either singly or jointly by the accused, who is member of organised crimes syndicate or is undertaken on behalf of such syndicate. In the case in hand, no efforts were made by the prosecution to show that past two offences in respect of which charge-sheets were filed, were committed by the applicant as member of organised crime syndicate, I.e, acting as syndicate or a gang or on behalf of such syndicate . In **Ranjeetsingh**

Brahmajeetsing Sharma v. State of Maharashtra & Anr. [3], it is held, the unlawful activity alleged in the previous charge-sheets should have nexus with the commission of the crime which MCOCA seeks to prevent or control. Thus, it was imperative on part of the prosecution to establish prima-facie some nexus between the past crimes at the discredit of the applicant and the present crime, which has not been shown by the prosecution nor the material on record suggests and indicates such nexus.

14 Be that as it may, affidavit filed by the Investigating Officer in paragraph 15, reproduced list of registered offences against the applicant, who is stated to be a gang leader. Paragraph 16 simply, states that the offences committed by the accused/applicant are serious in nature and fourteen offences registered against him and in one of the offences, he has been convicted for life. Therefore, this affidavit is of no assistance to the

3 (2005) ALL MR (Cri) 1538 (S.C.)

prosecution to contend that the provisions of the MCOC Act have been correctly applied. Going further, in paragraph 16 of the affidavit, it is stated that the applicant has been convicted for life, however, it may noted that applicant has been acquitted by this Court in the year 2014 in an appeal preferred against life imprisonment. Thus, to be noted that even the Investigating Officer has not verified correct facts before filing affidavit.

15 In the subject crime, i.e., Crime No.574 of 2016, investigation is over and the charge-sheet has been filed. Applicant is in custody since October, 2016 and the trial is not likely to commence and conclude in the reasonable time. However, applicant's presence for the trial can be secured by imposing suitable conditions.

16 In that view of the matter and for the reasons stated, application is granted. Hence, following order:

ORDER

(I) The applicant in Crime No.574 of 2016 registered with Virar Police Station, shall be released on executing PR bond for the sum of Rs.50,000/- with one or more sureties in like sum.

(ii) The applicant shall attend the concerned police station twice a month, i.e., on 1st and 3rd Monday of every month commencing from March, 2021 between 11 a.m. to 12 a.m. till charge is framed.

(iii) The applicant shall furnish his permanent residential address and contact number to the Investigating Officer within seven days from the date of his release on bail.

(iv) The applicant shall not tamper with the evidence or attempt to influence or contact the complainant, witnesses or any person concerned with the case

17 The application is accordingly allowed and disposed of.

18 It is made clear that observations made here-in-above be construed as expression of opinion for the purpose of bail only and the same shall not in any way influence the trial in other proceedings.

(SANDEEP K. SHINDE, J.)